

**STATE OF RHODE ISLAND**

**CRANSTON, RITT**

**RHODE ISLAND TRAFFIC TRIBUNAL**

**STATE OF RHODE ISLAND**

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**v.**

**C.A. No. M20-0002  
19402507493**

**JOHN F NAZARIAN IV**

**DECISION**

**PER CURIAM:** Before this Panel on January 20, 2021—Magistrate Kruse Weller (Chair), Judge Almeida, and Magistrate DiChiro, sitting—is John F. Nazarian IV’s (Appellant) appeal from a decision of Chief Judge Matthew Smith (Trial Judge), sustaining the charged violation of G.L. 1956 § 31-15-4, “Overtaking on the left.” Appellant appeared before this Panel represented by counsel. Jurisdiction is pursuant to G.L. 1956 § 31-41.1-8.

**I**

**Facts and Travel**

On October 25, 2019 Sergeant James Needham (Sergeant Needham) of the Cranston Police Department issued a summons to the Appellant for the above-mentioned violation. *See* Summons No. 19402507493.

The Appellant pled not guilty to the charged violation on December 2, 2019, and the matter proceeded to trial on January 16, 2020. At trial, Officer Carroll testified that on October 25, 2019, she was dispatched to an accident on Scituate Avenue. *Transcript* at 11:15-16. Upon arriving on scene, Officer Carroll spoke with the operators of the two vehicles involved in the collision; the Appellant, who was operating a white BMW, and Mr. Silveira, who was operating a FedEx truck. *See id.* at 12:6-12, 16:21-23.

Mr. Silveira testified that he drives for FedEx and was driving in “Western Cranston on Scituate Ave” on October 25, 2019. *Id.* at 25:8-15. Mr. Silveira stated, “All of our trucks have a camera recording, at all times . . . and the camera is located on the passenger right side of the window.” *Id.* at 29:17-18, 41:9-10. Mr. Silveira brought a copy of that recording and presented the video at trial. *See id.* at 30:4-10. After the video was viewed by the Trial Judge and both parties, the video was entered into evidence and became part of the record. *See id.* at 45:7-22.

Mr. Silveira testified that after he made a delivery at 108 Scituate Ave, “I got back into the truck. I let four cars pass by and then I pulled out . . . [to deliver] to 125 Scituate Avenue, the nursing home . . . [and] as I was approaching, there was a silver car coming out, and I think I let, like, three or four black cars coming westbound go, and as the last one went, the silver car pulled out, and I went around to go in, and I got hit in my left tire and left bumper.” *Id.* at 26:10-24, 27:1-9. Mr. Silveira also explained that before he made the left-hand turn he went a little bit to the right because “I’ve got to cut my truck wide around that silver car that’s coming out.” *Id.* at 53:16-24, 54:1. He explained that his left-hand blinker was on and “[I] looked at both mirrors . . . didn’t see no (sic) one behind me at the time, and then as I go to cut left . . . is when I seen (sic) the BMW.” *Id.* at 28:11-13, 57:17-21. He testified that “I didn’t see the BMW, at all, until [the BMW] hit [the FedEx truck] or he hit my left front tire - - left front bumper.” *Id.* at 29:10-11.

Lastly, Sergeant Needham testified at trial as to the process in which he reviews accident reports and issues a citation. *See id.* at 62. He testified that Mr. Silveira brought in the CD, and “after I looked at the video, I re-reviewed the original accident report, and noticed that no citation was issued. Based on the new evidence, I felt as though it was an accurate depiction of what had occurred . . . [so] I then in turn issued and mailed [the citation] to the operator.” *Id.* at 61:17-18, 63:19-24, 64:1-4.

Sergeant Needham further testified that he has trained in accident reconstruction and that in his opinion based on his review of the video “that the operator of the vehicle - - the operator of the FedEx truck stopped, waiting for traffic to pass by, allowing him the right of way before he proceeded to make the left-hand turn . . . [and] when he proceeded to make his left-hand turn that is when the accident happened.” *Id.* at 84:20-24, 85:1-6. He explained that “FedEx truck, . . . is in the westbound lane, proceeds to make a left . . . where you see the camera . . . what I would assume would be the impact, because the camera shakes, is when it’s over . . . the double yellow line.” *Id.* at 81:14-20.

At the close of the testimony, the Trial Judge found based on the evidence that Mr. Silveira “had clearly begun to enter into the opposite lane of travel . . . to make his left-hand turn, and that was prior to what I view as the evidence of the BMW, driven by [Appellant], slamming into the mid-section or mid portion of the FedEx vehicle . . . sliding into the front of the front tire or left tire area of the FedEx vehicle.” *See id.* at 106:15-24, 107:1. The Trial Judge explained, “I make that finding, because I think it’s critical in this case, once the FedEx vehicle begins to take the left-hand turn into the westbound lane of travel, he then has that right of way, in my opinion, and it struck after he has already entered that lane of travel.” *Id.* at 107:1-7. The Trial Judge noted as well, that Mr. Silveira had testified that he was waiting at least two to three seconds before he made the left hand turn with a directional on and there was no evidence to contradict his testimony or evidence to show whether the Appellant made any noise to signal to Mr. Silveira of his presence. *See id.* at 108:1-12. The Trial Judge also found that Appellant “was traveling at a very high rate of speed when he made the impact with the FedEx truck driven by Mr. Silveira. There were skid marks evident in the exact lane of travel – in the westbound travel that followed all the way through to the point where [Appellant] ended up in the front left-hand

wheelwell of the FedEx truck . . . So that indicates to me that [Appellant was] traveling at a high rate of speed. That you did not anticipate the left-hand turn.” *Id.* at 108:22-24, 109:1-7.

The Trial Judge found there to be clear and convincing evidence based on the totality of the testimony presented by finding Mr. Silveira to be credible and the video to “speak for itself.” *See id.* at 109:13-23. The Trial Judge did not find there to be any evidence that Appellant made his presence known, either through a signal or noise, or to indicate that he attempted to pass on the left, which is contemplated in the statute. *See id.* at 109:8-14, 110:1-8. Thus, the Trial Judge found the Appellant guilty of the charged violation. *Id.* at 110:16-17. The Appellant subsequently filed this timely appeal.

## II

### Standard of Review

Pursuant to § 31-41.1-8, the Appeals Panel of the Rhode Island Traffic Tribunal possesses appellate jurisdiction to review an order of a judge or magistrate of the Rhode Island Traffic Tribunal. Section 31-41.1-8(f) provides in pertinent part:

“The appeals panel shall not substitute its judgment for that of the judge or magistrate as to the weight of the evidence on questions of fact. The appeals panel may affirm the decision of the judge or magistrate, or it may remand the case for further proceedings or reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the judge’s findings, inferences, conclusions or decisions are:

- “(1) In violation of constitutional or statutory provisions;
- “(2) In excess of the statutory authority of the judge or magistrate;
- “(3) Made upon unlawful procedure;
- “(4) Affected by other error of law;
- “(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- “(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

In reviewing a hearing judge or magistrate's decision pursuant to § 31-41.1-8, this Panel "lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact." *Link v. State*, 633 A.2d 1345, 1348 (R.I. 1993) (citing *Liberty Mut. Ins. Co. v. Janes*, 586 A.2d 536, 537 (R.I. 1991)). "The review of the Appeals Panel is confined to a reading of the record to determine whether the judge's [or magistrate's] decision is supported by legally competent evidence or is affected by an error of law." *Id.* (citing *Envtl. Sci. Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993)). "In circumstances in which the Appeals Panel determines that the decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or is affected by error of law, it may remand, reverse, or modify the decision." *Id.* Otherwise, it must affirm the hearing judge's (or magistrate's) conclusions on appeal. *See Janes*, 586 A.2d at 537.

### III

#### Analysis

On appeal, Appellant asserts that the Trial Judge's decision to sustain the charged violation was "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record[.]" Sec. 31-41.1-8(f)(5).

Specifically, Appellant contends that (1) the Trial Judge made inappropriate/erroneous inferences, (2) the violation was not established by clear and convincing evidence, and (3) the decision was affected by other error of law. *See* Appellant's Notice of Appeal. In addition, at oral argument, the Appellant argued the Trial Judge impermissibly shifted the burden of proof by finding there was an absence of evidence as to whether the Appellant sounded his horn before the accident occurred.

Rhode Island General Laws § 31-15-4 entitled “overtaking on left” provides in pertinent part “(1) the driver of a vehicle overtaking another vehicle proceeding in the same direction shall give a timely, audible signal and shall pass to the left at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.”

Based on the Trial Judge’s findings of fact, the Trial Judge ruled that the Appellant did not comply with the requirements of the statute that require both an audible signal and passing at a safe distance. The Trial Judge determined that the Appellant was traveling at high rate of speed, and because of the Appellant’s speed, any audible signal even if given, would be insufficient as it would be not be timely. Moreover, because the Trial Judge found no evidence of any efforts made by the Appellant to alert Mr. Silveira of his attempt to pass on the left and the resulting accident between the two vehicles, the Trial Judge’s decision that Appellant was unable to pass on the left at a safe distance is supported by clear and convincing evidence.

Based on the testimony at trial and the trial judge’s finding, it is clear the Court found Mr. Silveira to be credible, and specifically found there was no evidence that the Appellant sounded his horn or made any other noise to alert Mr. Silveira of his attempt to pass on the left. *See* Tr. 108, 109. Moreover, because the Appellant chose not to testify at trial or present evidence to the contrary, the Trial Judge inferred, based on the totality of the evidence, that the Appellant did not use an audible signal.

The Appellant contends the Trial Judge made inappropriate inferences about the absence of evidence as to whether the Appellant used his horn or made any noise. The Appellant argues because of these inferences, the Trial Judge impermissibly shifted the burden of proof to the Appellant to prove an audible signal was used.

The term burden of proof has two distinct meanings, one is meant as the burden of persuasion, the burden of establishing the truth of a given proposition, which never shifts, and the second refers to the burden of going forward with evidence. *See Murphy v. O'Neill*, 454 A.2d 248, 250 (R.I. 1983) (citing *Giblin v. Dudley Hardware Co.*, 44 R.I. 371, 375, 117 A. 418, 419 (R.I. 1922)). Although the burden of persuasion never shifts from the state, “the burden of going forward with evidence may indeed shift from side to side.” *In re Corryn B.*, 914 A.2d 978, 982 (R.I. 2007). The adversary who fails to present proof runs the risk the court may find against him; however, “the proponent never bears the burden of persuasion on this issue but at most, it may be said that he or she bears the burden of going forward and may present evidence that would negate the drawing of the inference.” *See Murphy*, 454 A.2d at 250.

As the burden of going forward with evidence may shift from side to side, the Appellant had an opportunity to refute the allegation that no audible signal was used. *See In re Corryn B.*, 914 A.2d at 982. Because Appellant failed to present any evidence, the Trial Judge properly inferred, based on the circumstances, that no audible signal was heard or used. This inference was based on the permissible shifting of the burden of going forward with the evidence, as the Appellant did not negate the allegation. *See Murphy*, 454 A.2d at 250. Thus, this Panel finds the Trial Judge did not impermissibly shift the burden of proof.

As this Panel “lacks the authority to assess witness credibility or to substitute its judgment for that of the hearing judge [or magistrate] concerning the weight of the evidence on questions of fact[,]” it will not disturb the Trial Judge’s determinations regarding the veracity of the witness’ testimony. *See Link*, 633 A.2d at 1348 (citing *Janes*, 586 A.2d at 537); *A. Salvati Masonry Inc.*, 151 A.3d at 749 (quoting *Van Dongen*, 132 A.3d at 1076). The Trial Judge made a factual determination, based on the credible testimony of Mr. Silveira and the video, that there

was no evidence to show that the Appellant used an audible signal. Consequently, this Panel is satisfied that the Trial Judge's decision was not clearly erroneous in light of the evidence presented.

**V**

**Conclusion**

This Panel has reviewed the entire record before it. Having done so, the members of this Panel are satisfied that the Trial Magistrate's decision was not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Sec. 31-41.1-8(f)(5).

The substantial rights of the Appellant have not been prejudiced. Accordingly, Appellant's appeal is denied, and the charged violation is sustained.

ENTERED:

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Magistrate Erika Kruse Weller (Chair)

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Judge Lillian Almeida

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Magistrate Michael DiChiro, Jr.

DATE: \_\_\_\_\_